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CURRENT TOPICS

Limited Certificates

WE are very pleased to see that the Court of Appeal have pronounced in favour of the legality of civil aid certificates limited to taking counsel's opinion (*The Law Society* v. *Elder*, *The Times*, 22nd March). In our view, much of the small amount of criticism which is levelled against the Legal Aid Scheme could be avoided by a greater use of the limited certificate. It is true that this would place a greater burden on the shoulders of Area Committees, whose size has already been increased. While it would be unwise to increase Area Committees to the extent of becoming unwieldy, we think that the risk of such an increase is one which should be accepted in order to secure the review of doubtful cases at various stages. In view of the statement of the MASTER OF THE ROLLS that the word " proceedings " in s. 1 (5) of the Legal Aid and Advice Act, 1949, means proceedings in existence or in *bona fide* contemplation and covers the case where proceedings are contemplated but have not yet been taken, the question arises whether there is not also power in the Act to grant a certificate limited to negotiation and to obtaining a copy of the police report and statement of witnesses and thus to by-pass the failure to bring into force s. 6 of the Act, which relates to legal aid in matters not involving litigation. We must beware of temptation.

The Compensation Fund and Local Authorities

IN an interesting article by Mr. W. S. A. ROBINSON on the Solicitors (Amendment) Bill in the issue of the *Justice of the Peace and Local Government Review* for 10th March, the question is discussed of the liability of practising solicitors employed by local authorities to make the annual payment, which the Bill proposes to increase from £5 to £10, to the fund for the provision of compensation to persons who sustain loss from the defalcations of solicitors. The writer points out that " the officer may not bear the contribution personally, because, generally speaking, the employing authority pays the contribution when the practising certificate is taken out." This, he argues, is only right and proper, as the solicitor employee gets no material benefit from holding a practising certificate, which is purely for the benefit of his local authority. He asks whether it is fully realised that where the employing authority does pay, then the ratepayer pays the bill. In the Solicitors Compensation Fund Rules, 1942, the writer states, a " loser " is described as a " person " who has sustained loss in consequence of dishonesty by any solicitor . . . in connection

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with the solicitor's practice." He asks the following questions: "Would a local authority be a 'person' or would the work of a solicitor of a local authority be a 'practice' within the rules? Is any principle involved in the fact that ratepayers are helping to provide such a fund through the rates?"

Hire-Purchase: Board of Trade Licence

FOLLOWING the Hire-Purchase and Credit Sale Agreements (Control) Order, 1956 (S.I. 1956 No. 180), which came into operation on 18th February, the Board of Trade have granted a licence (the Hire-Purchase and Credit Sale Agreements (Contracts) Licence, 1956 (S.I. 1956 No. 373) under art. 6 (11) of S.I. 1956 No. 180. The licence applies to goods to which S.I. 1956 No. 180 applies but to which the Order of 1955 did not apply. Under it a person may dispose of such goods under a written hire-purchase or credit-sale agreement notwithstanding that one or more of the requirements specified in Sched. II to S.I. 1956 No. 180 have not been satisfied, provided that certain conditions have been fulfilled. The conditions are that (1) the hirer had, before 18th February, 1956, entered into a contract in writing to buy the goods; (2) the contract to buy was valid and enforceable on 21st March, 1956; (3) the goods are to be manufacturered to the special order of the hirer; and (4) work on the goods in fulfilment of the contract to buy had been begun before 18th February, 1956.

The Planning Acts and the Federation of British Industries

PROPOSALS for a review of the Town and Country Planning Act, 1947, have been submitted to the Minister of Housing and Local Government by the Federation of British Industries. They say: "Planning authorities require guidance as to the type of condition which may properly be imposed on industry in the interest of local amenity." They still find that planning applications are not considered expeditiously enough by local planning authorities, and again urge the need to reduce delays and overhaul the administrative machinery. Delays are also involved when an appeal is lodged against the local planning authority's decision. They suggest that steps should be taken to cut down the time between the date when the appeal is lodged and the date of hearing, and again between the date of hearing and the giving of the Minister's decision. They also make the point that the use of designation and provisional markings on development plans "causes much anxiety to industrialists, whose property may become unsaleable in the open market," and they suggest that these notations should be abolished. With regard to transfer of an industry under the provisions of development plans, they say that the present procedure causes "frustration and acute anxiety." Forecasts by local planning authorities of the estimated dates of disturbance are said to be "extremely vague," and industry "is not given firm indications of the amount of compensation that will be awarded when the acquisition is made."

Accuracy of Road Accident Statistics

THE accuracy and completeness of the Home Office statistics given in their annual publication, "Offences Relating to Motor Vehicles," were contrasted by Dr. A. L. GOODHART, Q.C., in his address on 17th March to a northern conference of the Magistrates' Association, with what he described as the "inadequate and misleading" figures annually published by the Ministry of Transport under the title: "Road Accidents: General Summary and Statistical Tables." He criticised, in particular, the figures dealing with the causes of accidents as having been based on police reports, in their turn based on statements by interested parties. In 1954, there were 200,000 road accidents, giving rise to 240,000 road casualties of which 60,000 were pedestrians. In 45,000 of these cases the pedestrian was described as "heedless of the traffic." Yet, in 1954, of 2,226 pedestrians killed, 1,392 were over fifty and 478 were under eleven. Statistics placing the blame on elderly people were misleading. Of 200,000 accidents only 7,300 were said to be caused by defective vehicles. Yet on the second reading of the present Bill it had been admitted that this was inaccurate, the true figure, according to the Road Research Laboratory, being ten times as many accidents due to defective vehicles. Driving under the influence of drink or drugs was given, in table 40, as responsible for only 826 accidents out of 200,000, but the Home Office statistics showed that in 1954 more than 3,500 drivers were prosecuted for the offence. Professor Goodhart said that the Ministry of Transport figures were not merely completely valueless, but were a major handicap to any serious consideration concerning amendments in the law.

Detention Centre Treatment for Boys

HOME Office Circular No. 37/1956, sent to magistrates' courts and juvenile courts in a number of counties, and juvenile courts in the Metropolitan area, refers to Home Office Circular No. 167/1952 of 15th August, 1952, notifying the availability of the detention centre at Campsfield House, Kidlington, Oxfordshire, for the reception from those courts of male persons who have reached the age of fourteen but not the age of seventeen years. It states that experience of the working of this centre since its opening in August, 1952, may be of value to the justices in selecting cases from this age group for detention centre treatment. It goes on to say that it has been assumed that courts will ordinarily impose a period of three months' detention which is laid down (subject to certain exceptions) in s. 18 (1) of the Criminal Justice Act, 1948, and that experience suggests that the régime of the detention centre is most effective in the case of boys to whom a strictly regulated institutional life is entirely new, and that it is rarely successful in the case of a boy who has already failed to respond to training in an approved school. For certain classes of boy, notably those who have already undergone long-term institutional training, have appeared many times in juvenile courts, show symptoms of maladjustment or more serious mental disturbance, are dull and backward, or are physically unfit for strenuous exercise, detention centre treatment is generally found to be unsuitable. The most hopeful category is perhaps that of the well developed, undisciplined young "rough" who has hitherto come off best in his conflicts with authority and, without having developed a bent for crime, requires to be taught a lesson. It is also important that a boy committed to a detention centre should not be suffering from any physical or mental disability that would prevent him benefiting from the treatment. He should be physically and mentally fit to take part in physical training, hard work and the vigorous activities of the centre. A description of the short sharp lesson which the régime provides is set out in a brief appendix to the circular.

THE ROYAL COMMISSION ON MARRIAGE AND DIVORCE—I

THE first criticism of the Report of the Royal Commission on Marriage and Divorce (Cmd. 9678, 11s. 6d.) which is likely to be made is that four and a half years is a long time to take to reach disagreement. But although this disagreement on the main point—the question of the extension of the grounds of divorce—may mean that the Report will not please either the advocates or the opponents of such extension, the very fact that after such a painstaking inquiry the Commission should have been unable to reach an agreement is itself an indication of the disagreement which exists throughout the whole country. Moreover, it is impossible after reading the Report not to be impressed by the enormous field studied by the Commission and the detailed nature of the inquiry and recommendations.

The object of these two articles is to try to summarise the main recommendations, but as the Report is 400 pages long (including the appendices), many of the recommendations can only receive the briefest mention.

The Report contains an Introduction and an Historical Summary of the Divorce Law in England and Scotland, and its body is divided into sixteen parts. Then follows a summary of the recommendations, a statement of his views by Lord Walker and a note of dissent by Sir Frederick Burrows. Finally come the appendices containing lists of witnesses and correspondents, some very full and interesting statistics, a statement of grounds of divorce and matrimonial property systems in other countries and a draft code for jurisidiction and recognition of foreign decrees.

The Introduction requires no comment except that it records that the Commission held 102 meetings in London and Edinburgh of which no less than 41 were mainly devoted to the hearing of oral evidence. In all, evidence was heard from 67 organisations and 48 individual witnesses. One other point made by the Introduction is a reminder that, although this Report has been colloquially referred to as the Report of the Divorce Commission, in fact the scope of the inquiry embraced not only the law relating to divorce and other matrimonial proceedings but also the administration of that law in all courts and the law governing the property rights of husband and wife. Further, the subject of the inquiry extended to Scotland as well as to England and Wales, but no reference will be made in these articles to the changes proposed for Scotland.

Divorce by consent?

Most interest will be attracted by Pt. I of the Report which, in seventy-four pages, considers the present grounds for divorce in England and Scotland and the suggestions for new grounds. After stating the general considerations which apply to the problem of marriage failure, the Commission examine the principles on which divorce is at present granted. In both England and Scotland the existing divorce law is founded on what may be called the "doctrine of the matrimonial offence." Certain acts are termed matrimonial offences and are regarded as being fundamentally incompatible with the undertakings entered into at marriage, so that the commission of these acts by one party to the marriage gives the other an option to have the marriage terminated by divorce. The only exception to this principle is the ground of insanity, to which special considerations apply. Some witnesses strongly supported the retention of the matrimonial offence as the determining principle of the divorce law, while others argued that the time had come to recognise a new principle, namely, that the basis of granting divorce should be that the marriage had irretrievably broken down. This principle would involve adding to the present law divorce by the mutual consent of husband and wife or divorce at the option of either spouse after a period of separation. It will be remembered that in the Bill introduced by Mrs. Eirene White, M.P., it was proposed that divorce should be possible at the end of a period of seven years with the condition that there should be no reasonable prospect of reconciliation. This Bill was withdrawn after the second reading on the Government undertaking to set up the Royal Commission which has now completed its inquiry.

After the fullest examination of these conflicting points of view the Commission are, with the exception of Lord Walker, all agreed that the present law, based on the doctrine of the matrimonial offence, should be retained. They differ, however, on whether or not it would be in the interests of the community as a whole that an additional ground should be introduced on the principle that there should be dissolution of a marriage which is irretrievably broken down, and it is on this point that there is complete deadlock. Nine members of the Commission are opposed to the introduction of the doctrine of breakdown of marriage in any form because they consider that it would be gravely detrimental to the well-being of the community, while nine members of the Commission consider that the time has come to introduce the doctrine of breakdown of marriage to a limited extent. They recommend that, where husband and wife have lived separate and apart for seven years, it should be possible for either spouse to obtain a dissolution of the marriage if the other spouse does not object. Four of these nine members consider that it would be desirable to widen the scope of the new ground in order to allow a husband or wife to obtain a dissolution of the marriage at the end of such a period of separation, notwithstanding the other spouse's objection, if he or she could satisfy the court that the separation was in part due to the unreasonable conduct of the other spouse. This, then, is the great conflict of opinion revealed by the Report and it is impossible in these articles to say more than that the arguments for and against each proposal are fully set out in the Report.

It should be added that Lord Walker in his statement of his views is unable to accept that the doctrine of the matrimonial offence ought to be retained, but considers that a marriage should be indissoluble unless, the spouses having lived apart for not less than three years, either spouse shows that the facts and circumstances affecting the lives of the parties adversely to one another are such that it is improbable that an ordinary husband and wife would ever resume co-habitation. No disrespect to Lord Walker is intended when it is said that the writer's imagination quails at the thought of the litigation which this proposal would attract if it became law.

Possible new grounds

Then comes the consideration of the suggested new grounds for divorce, and the Commission have considered all the following: wilful and persistent refusal of sexual intercourse; wilful refusal to have a child; cruelty to a child of either spouse; the commission of a sexual offence against a child

of either spouse; lesbianism; wilful refusal to consummate the marriage; artificial insemination by a donor without the husband's consent; detention as a mental defective of dangerous or violent propensities; incompatibility of temperament; imprisonment; murder; habitual drunkenness; and intolerable conduct.

The Report contains a full discussion on each of these suggested new grounds (some of which are already included, at least to some extent, in the present grounds) and recommends that the following should be new grounds of divorce—

(*a*) wilful refusal by a spouse to consummate the marriage (instead of being a ground for nullity as at present);

(*b*) acceptance by a wife of artificial insemination by a donor without the husband's consent;

(*c*) the fact that the spouse is a mental defective who, by reason of his or her dangerous or violent propensities, has been detained in an institution for mental defectives for a continuous period of at least five years immediately preceding the presentation of the petition, and whose recovery from such violent or dangerous propensities is highly improbable.

On these three suggested new grounds the following comments may be made:—

(*a*) The fact that this should be a ground for divorce instead of nullity would not at first sight appear to be of great practical importance. The significance of the proposed change lies in the fact that the jurisdiction of the courts for divorce is not the same as the jurisdiction in nullity. Thus the alteration would be of importance in cases in which considerations other than of purely English law arise. It has, ever since 1937, been argued that it is illogical to have as a ground for nullity an offence which comes after the marriage whereas the decree of nullity affects the validity of the marriage itself.

(*b*) The Commission regard this as an injury which in its possible consequence to a husband is as serious as that of adultery. The intention of the wife in such a case is, and the result may be, to father a child on the husband without his knowledge; and the Commission think that accordingly the husband should have the same remedy as in a case where the wife commits adultery.

(*c*) Although the Commission recognise it is unlikely that there would be any substantial number of mental defectives who would come within the scope of the proposed ground, they consider that this ground constitutes a case of exceptional hardship, analogous to the hardship suffered by a man or woman whose partner has become incurably insane. The objects of the marriage relationship have been just as completely and finally frustrated.

Alterations in existing grounds

Then follows an examination of the present grounds of divorce with some suggested alterations.

These suggestions can briefly be set out as follows:—

Adultery.—No change is proposed. Some witnesses thought that the law should be modified in respect of proceedings based on the commission of a single act of adultery, but after careful consideration the Commission did not accept this suggestion.

Cruelty.—The Commission consider that the present law does not require any material change. The present legal requirements of cruelty in respect of injury to health and intention are valuable safeguards, the removal of which would, in the view of the Commission, lead to divorce on the ground of incompatibility of temperament. In one respect, however, it is considered that the law requires modification. Where the injured spouse has lost all affection or is still apprehensive of injury to health and feels unable to go on with the marriage, it is considered that the remedy of divorce should not be denied to him. Accordingly, the Commission recommend that it should not be necessary for the petitioner to prove that he or she needs protection and that proof of past cruelty should in itself confer a right to divorce although not to judicial separation.

Desertion.—Many of the witnesses said that the present law hampers attempts at reconciliation. First, a spouse may wish to invite a deserting spouse to return, but, if he does so and the reconciliation fails, there will almost certainly be an interruption in the continuity of the desertion. Second, difficulties arise in connection with offers to return made by the deserting spouse. These difficulties have resulted in another disagreement between the members of the Commission. Fourteen members are in favour of, and five against, a proposal that, in order to encourage husbands and wives to come together for a short period to find out if a lasting reconciliation can be effected, there should be a new ground of divorce constituted by two periods of desertion which together amount to at least three years, within a period of three years and one month immediately before the presentation of the petition. This new ground would be an addition to the present ground of divorce for one period of three years' desertion. In effect, this proposal allows a period of reconciliation of not more than one month.

The Commission considered the difficult problem of constructive desertion and the question of proof of intent to drive away. Again this problem has caused a disagreement. Fourteen members consider that, despite the views of the Judicial Committee of the Privy Council recently expressed in *Lang* v. *Lang* [1955] A.C. 402, some alteration in the law is desirable and recommend that proof of conduct of a grave and weighty nature which is such that a spouse cannot reasonably be expected to continue with the conjugal life and which has compelled that spouse to break off co-habitation should, in future, raise an irrebuttable presumption that the other spouse intended to bring the married life to an end.

The remaining five members consider that the need for the petitioner to prove "an intent to drive away" is a necessary safeguard against too wide an extension of the doctrine of constructive desertion, leading to divorce being granted on the ground of incompatibility of temperament. These five are opposed to any change in the present law.

In order partially to overcome the difficulties raised by such a case as *Long* v. *Long* (1940), 57 T.L.R. 165 (which decided that where the parties enter into a deed of separation desertion on the part of one of them is terminated), it is recommended that where a husband and wife have separated before the 1st October, 1937, in circumstances amounting to desertion on the part of one of them, the fact that before that date they had entered into an agreement to live separate and apart should no longer apply to bar the deserted spouse from bringing a petition for divorce on the ground of desertion. The point here is that before the Matrimonial Causes Act, 1937, deeds of separation were commonly entered into when matrimonial disputes arose and at that time considerations of desertion in regard to divorce did not arise.

Insanity.—The Commission recommend that the definition of care and treatment for the purposes of s. 1 of the Matrimonial Causes Act, 1950, should be substantially widened, but that the requirement that the insanity should be "incurable" to be a ground for divorce should be retained.

E. R. DEW.

THE RULE IN RE BALLARD'S CONVEYANCE

In *Re Ballard's Conveyance* [1937] Ch. 473, Clauson, J. (as he then was), held that, where the parties to a restrictive covenant purport to annex the benefit of the covenant to specified land, but the covenant does not in fact concern or touch the whole of the land, the annexation is ineffective, and the benefit of the covenant will not run with the land; nor could the court sever the covenant and treat it as annexed to the part of the land which the covenant did concern or touch.

The property bound by the covenant was conveyed by *B*, as tenant for life, to *W*, the applicant, by a conveyance on sale dated 28th June, 1906, whereby the applicant covenanted with *B* her heirs and assigns and successors in title owners from time to time of the Childwickbury Estate that the applicant his heirs and assigns would perform and observe the conditions and stipulations set forth in the schedule thereto.

In 1907, *B* sold and conveyed the remainder of the Childwickbury Estate to *J*, who in 1919 conveyed the whole of the estate to the respondent. Neither conveyance mentioned the covenant contained in the conveyance to the applicant. *B* died in 1919.

The applicant claimed a declaration under s. 84 of the Law of Property Act, 1925, that no part of his property was any longer affected by the restriction contained in the conveyance of 28th June, 1906. The validity of the covenant as between the covenantor and the original covenantee was not disputed.

Clauson, J., found—

(1) that the covenant was taken for the benefit of the Childwickbury Estate as described in the conveyance to *J*;

(2) that the benefit of the covenant was not restricted to such parts of the Childwickbury Estate as were for the time being unsold, i.e., remained the property of *B*, the tenant for life, and those claiming through or under the settlor otherwise than by virtue of a purchase;

(3) that the Childwickbury Estate comprised about 1,700 acres;

(4) that, while the covenant might concern or touch a small portion of the land to which it had been sought to annex it, it failed to concern or touch by far the largest part of the land;

(5) that there was no authority for severing the covenant and treating it as annexed to such part of the land as was touched by, or concerned with, the covenant. The attempted annexation therefore failed.

The decision of Clauson, J., has been criticised in the legal press. Dr. Radcliffe, at 57 L.Q.R. 210, points out that the decision casts an impossible burden upon the planner of an estate who may have "to determine with the utmost nicety, and at the peril of seeing his whole covenant fail, how far the annoyance caused by a fried fish shop would extend." And in *Northbourne (Lord)* v. *Johnston & Son* [1922] 2 Ch. 309, at p. 318 (not cited in *Ballard's* case), Sargant, J., said, "In the case of a building estate of any size, it would be impossible to define and point out precisely those portions of it which the owner was seeking to protect or benefit by the restrictive covenants on any particular plot."

It also seems that to construe the words "the Childwickbury Estate" as including every part of the estate whether or not it was touched or concerned by the covenant infringed the cardinal rule (*per* Lord Brougham, L.C., in *Langston* v. *Langston* (1834), 2 Cl. Fin. 194, at p. 243; and *per* James, L.J., in *Re Florence Land and Public Works Co.* (1878), 10 Ch. D. 530, at p. 544) that all documents are to be construed *ut res valeat magis quam pereat*, and that the words "the Childwickbury Estate" should have been held to include only those parts which were touched or concerned by the covenant, thus giving effect to the obvious intention of the parties.

In *Zetland (Marquis)* v. *Driver* [1937] Ch. 651, at p. 658, where the covenant did not touch or concern the whole of the land to which it purported to be annexed, Bennett, J., following *Ballard's* case, held that the attempted annexation failed. However, the Court of Appeal ([1939] Ch. 1) reversed Bennett, J.'s decision on the ground that, in *Ballard's* case, the covenant was expressed to run with the whole estate, whereas in *Zetland's* case the covenant was expressed to be for the benefit of "the whole or any part or parts" of the retained land. The Court of Appeal expressed no opinion as to the decision in *Ballard's* case beyond saying that it was distinguishable on the above-mentioned ground. But it seems that the words "the whole or any part," etc., if read literally, would include every part of the land, whether or not it was touched or concerned by the covenant, and would not avoid the mischief of *Ballard's* case. Probably the Court of Appeal considered that the words "the whole or any part" were impliedly qualified so as to extend only to such parts of the land as were touched or concerned by the covenant, and this construction had been proposed by counsel for the appellants. The addition or implication of the words "as were touched or concerned," etc., with the aid of the maxim *id certum est quod certum reddi potest* (*Smith* v. *River Douglas Catchment Board* [1949] 2 K.B. 500, at p. 508), would comply with the rule that the land intended to be benefited must be defined with reasonable certainty (*Re Union of London and Smith's Bank, Ltd.* [1933] Ch. 611, at p. 631).

Basis of the decision

The question whether Clauson, J.'s decision has any sound basis in law will now be considered. Clauson, J., based his decision on *Rogers* v. *Hosegood* [1900] 2 Ch. 388, at p. 395, where Farwell, J., held that the benefit of a covenant could not run with the land unless it touched or concerned the land. But in that case the covenant was expressed to ensure the benefit of all or any part of the covenantee's land adjoining or near to the premises conveyed to the covenantor, and the question in issue in *Ballard's* case did not arise.

The writer can find no reported case before *Ballard's* case where the purported annexation of a covenant failed on the ground that the covenant did not touch or concern the whole of the land. The law of restrictive covenants has been elaborately discussed in a large number of cases from *Spencer's Case* (1583), 5 Co. Rep. 16*a*; Smith's Leading Cases, 13th ed., vol. I, p. 51, down to the present time, and it is hardly conceivable that the point would have been overlooked had it been tenable.

It is instructive to consider *The Prior's Case* (1368), Co. Litt. 385*a*; Smith's Leading Cases, 13th ed., vol. I, p. 55, where the benefit of a covenant by a prior with the lord of a manor and his heirs to sing in a chapel, parcel of the manor, for the lords of the said manor was held to pass to a successor in title of the covenantee, for the successor in title "should have an action against the prior, for the covenant is annexed to the chapel which is within the manor, and is annexed to the manor, as it is there said."

It can hardly be thought that the covenant touched or concerned any part of the manor except the chapel; yet the purported annexation to the manor (which, of course, included the chapel) did not prevent the benefit of the covenant from running with the chapel.

The cases on building schemes are especially significant, for it is an essential part of the scheme that the covenants should be intended to benefit all the property comprised in the scheme (*Osborne* v. *Bradley* [1903] 2 Ch. 446, at p. 453). If, therefore, the decision in *Ballard's* case was correct, any covenant which did not touch or concern the whole of the property would be unenforceable except as between the parties. It cannot be supposed that such an obvious defence would have been overlooked by Farwell, J., in *Osborne* v. *Bradley*, *supra*, or in *Elliston* v. *Reacher* [1908] 2 Ch. 665 by Parker, J., whose judgment is always treated as an authoritative and exhaustive statement of the relevant law.

Covenants between lessor and lessee are closely analogous to covenants affecting the freehold. It will be remembered that, by the common law or by statute (32 Hen. VIII, c. 34, repealed and replaced by ss. 141 and 142 of the Law of Property Act, 1925), covenants which touch or concern the demised land run with the land and are enforceable by or against an assignee of the reversion or by or against an assignee of the term. In all cases the covenant must touch or concern the demised land; yet it has never been suggested that the covenant must touch or concern the whole of the demised land. It is significant that the point is not mentioned in Platt on Leases, "a book of authority": *per* Lord Greene, M.R., in *Milmo* v. *Carreras* [1946] 1 K.B. 306, at p. 310. Thus a covenant by the lessee of a farm and farm-house to reside in the house (*Tatem* v. *Chaplin* (1793), 2 Hy. Bl. 133; *Lloyds Bank, Ltd.* v. *Jones* [1955] 3 W.L.R. 5, at p. 10, or to repair it (*Twynam* v. *Pickard* (1818), 2 B. & Ald. 105), will bind an assign of the lease without any evidence to show that the covenant touches or concerns the farm land. Similarly the benefit of a lessee's covenant which runs with the land is severable and will pass to the assign of part of the reversion, whether spatial or in interest (see Platt on Leases, vol. 2, pp. 391, 392); and in *Taite* v. *Gosling* (1879), 11 Ch. D. 273, Fry, J., applied this principal to covenants affecting freehold land. Decisions on covenants between lessor and lessee were also applied to covenants affecting freehold land by Farwell, J., in *Rogers* v. *Hosegood* [1900] 2 Ch. 388, at p. 395, and by Greer, J., in *United Dairies, Ltd.* v. *Public Trustee* [1923] 1 K.B. 469.

In sum, it is submitted that—

(1) there is no authority to support the view that annexation of the benefit of a covenant will fail unless the covenant touches or concerns all the land to which the benefit purports to be annexed;

(2) *The Prior's Case* supports the validity of the annexation;

(3) the benefits of covenants between lessor and lessee on an assignment of part (spatially) of the reversion will be apportioned without evidence that the covenant touches or concerns the whole of the demised land;

(4) the law as to apportionment of the benefits of covenants between lessor and lessee applies to covenants affecting freehold land; and

(5) the absence of any reported case before *Ballard's* case in which the validity of annexation had been disputed on the ground that the covenant did not touch or concern all the land is strong evidence that the point is not tenable.

Form of covenant

Conveyancers commonly rely on *Zetland's* case, *supra*, as a sufficient answer to Clauson, J.'s decision and content themselves with adding to the covenant the words "the whole or any part or parts," etc. As, however, the decision in *Zetland's* case depended on the construction of the particular covenant, it is safer expressly to provide that the covenant shall be annexed only to such part of the land as is touched or concerned by the covenant.

The following form of covenant appears to be suitable:—

"(1) The purchaser hereby covenants with the vendor so as to bind the property hereby assured and every part thereof for all time and the owners and occupiers thereof for the time being that the purchaser and all persons deriving title under him (including occupiers) will at all times hereafter perform and observe the stipulations contained in the schedule hereto. Provided that the purchaser shall not be liable for a breach of any of the said stipulations (being a stipulation restrictive of the user of the said property or any part thereof) occurring after the purchaser has ceased to have any interest in the said property or in the part thereof in respect of which the breach occurred.

(2) The foregoing covenant is intended to benefit the property belonging to the vendor shown on the plan hereto and thereon coloured and every part thereof and to be enforceable by the vendor and his successors in title and the persons deriving title under him or them (including the owners tenants and occupiers for the time being of the said property or any part thereof) but shall be annexed to and run with such part or parts of the said property only as is or are capable of being benefited by the said stipulations (whether affirmative or restrictive) or some or one of them."

Some practitioners rely on s. 78 of the Law of Property Act, 1925, to effect annexation. But the effect of this section is often overlooked and it is preferable expressly to state whether or not annexation is intended. Another objection to reliance on s. 78 is that the definition of successors in title of the covenantee as including the owner and occupiers for the time being of the covenantee's land is confined to restrictive covenants. The draftsman of the Act seems to have forgotten that the benefit of affirmative covenants may be annexed to the land of the covenantee although the burden of the covenant cannot be annexed to the land of the covenantor.

L. H. ELPHINSTONE.

Mr. DAVID J. GRUNDY, assistant solicitor to Wolverhampton Corporation, has been appointed senior assistant solicitor to Burnley Corporation.

Mr. R. A. LLOYD, solicitor, of Southport, has been appointed president of the Southport Chamber of Trade.

The Colonial Office announces the following appointments and promotions in the Colonial Legal Service: Mr. D. L. BATES, Senior Crown Counsel, Northern Region, Nigeria, to be Solicitor-General, Northern Region, Nigeria; Mr. J. BENNETT, Chief Magistrate, Nigeria, to be Puisne Judge, High Court of Lagos, Nigeria; Mr. D. M. HORNBY, Resident Magistrate, Kenya, to be Registrar of the Supreme Court, Kenya; and Mr. W. J. PALMER, Magistrate, Federation of Nigeria, to be Chief Registrar, Eastern Region, Nigeria.

Mr. JOHN IDOWU CONRAD TAYLOR has been appointed Judge of the High Court, Western Region, Nigeria.

Taxation

PENALTIES IN BACK DUTY CASES

THE figures recently published by the Comptroller and Auditor-General confirm the experience of practitioners that back duty cases in general as well as the number of cases settled continued to increase during the year ended the 31st March, 1955. Two other points are significant:—

(1) The penalties exacted rose steadily from 35 per cent. of the total duty for the year ended 31st March, 1952, to 69·2 per cent. for the corresponding period in 1955 (compared with 58·9 per cent. in the immediately preceding year).

(2) The number of cases settled by local inspectors dropped sharply from 133,757 cases for the year to 31st March, 1954, to 75,480 cases for the corresponding period last year. These cases comprise minor settlements mostly in respect of untaxed dividends notified by banks and others under s. 29 of the Income Tax Act, 1952 (formerly s. 27 of the Finance Act, 1951), where restitution of tax on the interest omitted is made, but usually no penalty exacted (other than interest on the tax from the time it became due).

The higher penalties and the sharp decline in the number of cases settled by local inspectors may partly be due to a stiffening of the attitude of the Inland Revenue and it may well pay to examine their powers under the various sections of the statute dealing with penalties.

Although the penal sections are numerous, in practice it will be found that the sections most often referred to by the Inland Revenue are s. 25 (3) of, and Sched. VI, para. 4, to, the Income Tax Act, 1952.

Failure or delay in returning income

The former applies to cases where there is (1) neglect to deliver; (2) refusal to deliver; or (3) wilful delay in delivering a true and correct return as required by ss. 18 to 24 of the Act. Section 25 (3) applies to individuals as well as to corporate bodies, but only to such returns as the person is *required to make* "under the preceding provisions of this Chapter," viz., ss. 18 to 24 of the Act. The most important are ss. 18 and 19.

By s. 18 it is the duty of a person *liable to tax* to notify the inspector before the end of the year of assessment that he is chargeable. A person not liable to tax need, however, not do so.

By s. 19 every individual—as distinct from a corporate body—is on notice being given by the inspector required to make a true and correct return of all the sources of his income and the amount derived from each of these sources. The notice is embodied in the return form sent by the inspector of taxes; therefore, every individual receiving the form is automatically given notice. Thus failure to make a return within the prescribed period constitutes a breach of the section.

The failure to make a return not obligatory under ss. 18 to 24 of the Act, e.g., repayment claims, is outside the operation of s. 25 (3), a point sometimes worth while remembering. On the other hand, this section does not only apply to the omission to make a return but also to cases where a false return is made, as the latter is not a "true and correct" return required to be delivered by the Act.

The penalties prescribed by the section are a fine of £20, plus "treble the tax which he ought to be charged." This is interpreted to mean three times the tax directly assessable on the taxpayer, but not tax deducted at source or payments free of tax, e.g., dividends, building society interest, Sched. A tax not borne by the taxpayer but by the occupier, etc. An allowance is made for personal and similar reliefs. On proceedings for penalties being taken before commissioners this constitutes the maximum penalty. If proceedings are taken in the High Court the penalty is fixed at that amount with no power of the court to vary it either way. The commissioners have, however, power under s. 500 of the Act to mitigate any penalties so imposed.

Fraud

Schedule VI, para. 4 (1), relates to persons, i.e., including companies, making *fraudulent* statements in connection with claims for any relief or *fraudulently* concealing or *untruly* declaring any income chargeable on another person or *fraudulently* making a second claim in respect of the same cause. In other words this provision aims at a taxpayer who claims allowances or reliefs to which *he knows* he is not entitled and imposes a penalty on persons guilty of fraud—

(i) in making a claim for relief; or
(ii) in obtaining any relief.

Fraud is an essential element under this section. In practice this provision is often invoked in connection with claims for personal or other reliefs, e.g., capital reliefs under Pt. X of the Act. Since a claim for relief must in most cases be supported by a statement of income a breach can be committed by the taxpayer either making a false claim for relief *or* a false return of income accompanying the claim for relief *or* both. Even where allowances are claimed correctly, but this is accompanied by a false return, an offence under this paragraph is committed (*A.-G.* v. *Lloyds Bank, Ltd.* (*as Lillicrap's Executors*) (1944), 26 Tax Cas. 100).

On the other hand a false return of income not made in connection with any claim for relief is outside this section. Nor can this section be invoked for any year in which the taxpayer omitted to make a claim.

The penalty for an infringement of this provision is higher than for a breach of s. 25 (3). It is £20 plus treble the tax in respect of all the sources of the taxpayer's *income*, whether chargeable directly on him or not. No allowance is made for any reliefs or charges on his income, the penalty is calculated at the full standard rate for the years in question, and there is no power to impose a lesser penalty (*Lord Advocate* v. *McLaren* (1905), 5 Tax Cas. 110) apart from the general powers conferred upon the commissioners by s. 500 of the Act to mitigate any penalty after judgment. The penalty—as in s. 25 (3)—is, of course, in addition to the tax chargeable.

Time limit

The time limit for taking proceedings in respect of both sections is six years from the date of committing the offence, viz., the signing of the incorrect return or claim or the expiration of the time limit for making the return (s. 501 (1) of the Act). In cases of fraud or wilful default this is extended to three years from the final determination of the amount of tax lost (s. 501 (2) of the Act), which in practice gives the Inland Revenue sufficient time to recover penalties for any number of years.

This extension does not, however, apply to tax for any year before 1936–7 (s. 528 (3) (*a*) of the Act), nor to any proceedings against a personal representative (s. 501 (3) of the Act), against whom proceedings must be brought within six years (*A.-G.* v. *Canter* [1939] 1 K.B. 318; 22 Tax Cas. 422). In that case it was held that these are causes of action that survive against the personal representative within s. 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, and to which subs. (3) of that section (prescribing a shorter time limit in respect of actions in tort) has no application.

Tax lost and penalties

In back duty cases it is important to distinguish between the power to recover the amount of tax lost and penalties in respect of it. It is generally the practice of the Inland Revenue to review suspect cases and send out protective assessments shortly before 5th April of each year for any year that would otherwise pass out of date. In this connection it is worth while remembering that the six-year time limit does not apply to profits tax or excess profits tax, etc.; these can be recovered for any number of years even where no protective assessment has been made. The accountant generally appeals against these assessments not usually with the intention to bring them before the commissioners, but in order to safeguard the position of his clients. Then negotiations commence which sometimes take years before a settlement is reached and normally no proceedings are taken by the Inland Revenue during that period to recover any penalties. The result of this is that, although tax is recoverable for all the years for which assessments have been made, in the absence of fraud or wilful default penalties are only recoverable for those years that fall within the six-year period from the year of assessment in which the settlement is reached. Thus some years that are "in date" for the recovery of tax are "out of date" for penalties. This may prove helpful when negotiating the amount of penalty.

Penalty proceedings in respect of both sections dealt with above can only be commenced by order of the Commissioners of Inland Revenue (s. 499 (1) of the Act), a point to be watched should the inspector attempt to introduce the question of penalties at a hearing of an appeal before the commissioners to determine the amount of tax lost.

As can be seen, the powers of the Inland Revenue to impose penalties are wide and the fines that can be extracted are heavy. In practice the Inland Revenue hardly ever use these powers to the full, but the heavy penalties act as a deterrent and also as an inducement to settle. And indeed in the majority of cases the client is well advised to do so, unless he can *prove* that there have been no defalcations on his part. During negotiations the position as regards penalties should constantly be borne in mind. This is also an important factor to be taken into consideration when finally an offer in settlement is made.

M. E.

A Conveyancer's Diary

CHARITABLE TRUSTS: HOW SCHEMES FOR ALTERATION TO BE MADE

Two further matters on which the Nathan Committee made recommendations for legislation of a much more sweeping kind than the Government are prepared to accept follow naturally on the committee's proposals for extending the circumstances in which the objects of obsolete or obsolescent charitable trusts might be changed. They are, first, the initiation of schemes for the alteration of the objects of such trusts, and, secondly, the question who should be the authority with power to make a scheme sanctioning the proposed changes.

Initiation of schemes

As regards the initiation of schemes, at present the duty of initiation lies with the trustees. As Lord Simonds said recently, if by a change in social habits and needs, or by a change in the law, the purpose of an established charity becomes superfluous or even illegal, or if with increased knowledge it appears that a purpose once thought beneficial is truly detrimental to the community, it is the duty of trustees of an established charity to apply to the courts or, in suitable cases, to the Charity Commissioners (or, in educational matters, to the Ministry of Education) and ask that a *cy-près* scheme may be established (*National Anti-Vivisection Society* v. *Commissioners of Inland Revenue* [1948] A.C. 31, at p. 74). The committee did not propose any change in this basic principle, but it recommended that it should be modified in two directions.

In the first place, the committee thought that, if the trustees of a charitable trust took action and their proposals were not acceptable to the scheme-making authority, the trustees should have the right to ask for, and if necessary insist upon, a local public inquiry to investigate the merits of their proposals. The reason given for this suggestion was that, although there might occasionally be cases where proposals are misconceived and an inquiry would thus be a waste of public time and money, if the relations between the Charity Commissioners or, the Minister of Education and the administrators of charitable funds were what they ought to be, insistence on a public inquiry in such circumstances would be rare; and the risk of an occasional useless inquiry was, in the committee's view, preferable to leaving the trustees with the feeling that there was no opportunity of stating their views in public. In the second place, the committee recommended that in the case of local charities the appropriate local authority should be placed in the same position in this respect as the trustees. Under this recommendation the authority would have the right to make proposals for a modification of the trusts of a charity, and have its proposals investigated by means of a local public inquiry if they should not at first prove acceptable to the scheme-making authority. For this purpose the appropriate local authority, it was suggested, should be the county or county borough council, and in London the Corporation of the City of London, the London County Council and the Metropolitan Borough Councils. And, finally, the committee added the view that, while initiation of a scheme by the trustees should be regarded as the normal procedure, the Charity Commissioners and the Minister of Education, as

appropriate, should also be empowered to take the initiative if necessary; the possibility had to be faced that some trustees might be unreasonably slow in coming forward with proposals, and it seemed right, therefore, to give the scheme-making authorities the power of initiative as an assurance against this contingency.

Authority to make schemes

The other question, who should be the scheme-making authority or authorities, is no new one. Many persons, including lawyers of the eminence of Lords Westbury and Selborne (both Lord Chancellors in their day, and both thoroughly versed in the law and practice of the Chancery courts of their day), have expressed the opinion that the making of schemes for the alteration of charitable trusts is an administrative, not a judicial process, a matter on which a court of equity is by its training and habits unfitted to act. Basing its views on opinions of this kind, the committee reached the conclusion that the exercise of the wider scheme-making powers which the committee proposed should be created by legislation was of an administrative character, and that these powers would best be exercised by a reconstituted Board of Charity Commissioners or, in the case of educational trusts, by the Minister of Education, to the exclusion of the Chancery Division of the High Court which, at present, enjoys all the powers which the Commissioners and the Minister enjoy, as well as some ancient non-statutory powers of its own in relation to charities. As to the functions of the courts, the committee proposed that certain rarely used scheme-making powers of the county courts for the continued existence of which there was, in its view, no reason should be abolished. Apart from that, and the recommendation that the Charity Commissioners or the Minister of Education should alone exercise the new and greatly extended scheme-making powers which it had proposed (and which as I showed last week the Government has largely rejected), the committee had no suggestions to make for modifying the existing powers of the Chancery Division in the matter of scheme-making (or, indeed, in any other matter concerning charitable trusts).

The Government's view

The reaction of the Government to these far-reaching recommendations has been vigorous. Their view is that more emphasis than the committee had seen fit to give must be placed on the individual responsibility and initiative of the trustees of the particular trust and on their duty to carry out the terms of the trust so far as possible. This is not to be taken to mean that the Government consider that no reform is needed, but the Government believe that reform must come by persuasion. The Charity Commissioners and the Ministry of Education can help in this work of persuasion, the White Paper states, as they have done in the past, but their words will carry more weight if they remain as they are at present, the friend and adviser of trustees and not their master. Much good, it is added, can be done if the various voluntary bodies concerned with charities and with the social services take the initiative in persuading, inquiring and stirring up local interest.

This is the general approach of the Government to this part of the Nathan Report. Coming to particular aspects of these recommendations, the Government express the belief that the power to make proposals initiating a scheme should normally be confined to the trustees of the charity concerned. But, it is proposed, the central authorities should be able to proceed with a scheme without application by, or the consent of, the trustees, although this should be done only in very exceptional cases. This power should be exercised by the Charity Commissioners and the Minister of Education, but in the case of the latter should be subject to the approval of the Home Secretary (who, it is proposed, should now be appointed to represent the Commissioners in Parliament and in the Government, in the place of the Parliamentary Commissioner, who has up till now represented the Commissioners in Parliament and whose office would be abolished). The existing power of the Attorney-General to apply to the court to make a scheme should be retained, and in the Government's view no other body should be empowered to propose a scheme; in particular, it is thought to be wrong to put the appropriate local authority in the same position as the trustees. Local authorities should have no independent powers in this respect; their proper course, it is stated, is to persuade the trustees to ask for a scheme, and if the trustees will not do so, the local authority can ask the scheme-making authority to take independent action. The hope is expressed that such cases will be rare.

Trustees of charitable trusts and their advisers will, I think, generally welcome this rejection of proposals which would have given local authorities extensive opportunities of meddling with matters which are not their proper concern. One serious defect of the committee's proposals in this respect was that a great many charitable institutions are national and not local in their character, but apparently it was proposed that the appropriate local authority should nevertheless have powers of initiation. Another was that, in the case of genuinely local charities outside a borough, the county council, the proposed local authority, is in practice much too far removed to form a correct view of local needs. But as these proposals are now dead there is no point in expounding their defects. The proposals that the trustees or the local authority should be able to call for a public inquiry if a scheme is rejected by the scheme-making authority is also not approved by the Government, whose view is that the present practice, under which it is the scheme-making authority which decides whether or not to hold a public inquiry, has worked well and there is no need to vary it.

On the question of the identity of the scheme-making authority, the Government agree that the existing scheme-making powers of the county court should be abolished, and that the powers of the Chancery Division should in general remain unchanged. But the proposal that the extended scheme-making powers which the committee recommended should be exercisable by the central authority (the Commissioners or the Minister) to the exclusion of the Chancery Division is rejected. This rejection is, of course, connected with the rejection by the Government (with which I dealt last week) of the proposal that greatly enlarged powers of alteration of charitable trusts should be created by legislation. The argument that a court is unfitted to exercise such wide powers falls to the ground when (as the Government has now decided) the powers in this respect will remain much as they are, subject only to the clarification by statute of the circumstances in which they become exercisable. The powers of the court in this respect will therefore remain co-extensive with those of the Charity Commissioners and the Minister of Education. But one further power, it is proposed, the court will have in future. At present the court itself, by order by way of scheme or by order directing the settlement of a scheme in chambers, either deals with the matter itself or

directs that a scheme should be prepared by the parties for its approval. It is now proposed that the court should have power and discretion to decide, as an alternative, that the Commissioners or the Minister should prepare and put into effect a scheme within such limits, and for such purposes as the court declares. The background to this proposal is that the Commissioners or the Minister would be aware of other charities operating for the like purposes in the locality of the new charity or of other circumstances having bearing upon its convenient administration, and these factors unknown to the court should have their due weight in the framing of the scheme. This is a very sensible proposal.

This concludes my attempt to bring to the notice of a larger section of the profession than the Nathan Report and the Government's White Paper thereon are likely to reach the most important items on which legislation may be expected in this large subject of the law and practice relating to charitable trusts. The subject is sometimes regarded as a specialised one, but this seems to me to be a mistaken view: there must be hundreds of solicitors' offices in this country to whose care the affairs of at least one charitable trust are committed. In all these, the questions which have been discussed or touched on in these three articles must be of some interest; it is with that belief that I have written them.

"A B C"

Landlord and Tenant Notebook

REPAIRS INCREASE: EFFECTS OF FRAUD

THE essential facts of *Lazarus Estates, Ltd.* v. *Beasley* [1956] 2 W.L.R. 502 (C.A.); *ante*, p. 131, can be briefly stated. The plaintiff landlords served a notice of increase under the Housing Repairs and Rents Act, 1954, s. 25 (1), accompanied by the necessary declaration that the conditions justifying the increase were fulfilled. These gave the value of repairs done within the last four years as £566 6s. 2d., made up of external general repairs £266 6s. 2d., and other repairs wholly for the benefit of dwelling-houses comprised in the building, £300. The tenant did not, within the twenty-eight days allowed by Sched. II, para. 4, make an application to the county court to determine whether the work of repair had been carried out or whether its value was the value required. But she refused to pay the increase, alleging that (i) "other repairs" to the value of £300 had not been carried out, and (ii) the statement in the declaration that they had been carried out was false, and (iii) was false to the plaintiffs' knowledge, and contending that for these reasons no valid notice of increase had been served upon her.

The landlords' case was that an unchallenged declaration was made "satisfactory evidence" by Sched. II, para. 5, so that their right to an increase could not be disputed. The county court judge agreed with this view of the position; in the Court of Appeal, Morris, L.J., reached the same conclusion, but Denning and Parker, L.JJ., did not, and the case was remitted for a new trial accordingly.

One interesting feature of the case is that while Denning, L.J., supported his reasoning by reference to the three authorities cited on behalf of the tenant, Morris, L.J., considered that two decisions cited on behalf of the landlords were not in point, and based his dissenting judgment solely upon the construction of the language used in Pt. II of the Housing Repairs and Rents Act, 1954, the wording of which the learned lord justice considered compelling. Whether the tenant would have any other remedy was not gone into in this judgment; I do not suggest that it ought to have been, but Morris, L.J.'s "But the tenant's remedy was to have applied to the county court within twenty-eight days . . ." must, I submit, be read as limited to remedies under the statute.

The compelling wording

It will be convenient to describe the process by which the dissenting conclusion was reached first. That process was essentially a logical one, the main links in the chain of reasoning being as follows: s. 23 creates a right to increase rents when certain conditions are fulfilled, and those conditions include the production of satisfactory evidence that work of repair to a specified value has been carried out; s. 25 makes it a condition precedent to the recovery of the increase that the landlord serve the tenant with certain documents, including a declaration in a prescribed form; Sched. II, para. 4 (1), says: "Within twenty-eight days after the relevant date [by para. 1, the date of service of the notice of increase] the tenant may apply to the county court to determine whether, etc. . . and if on such application the court is not satisfied that, etc. . . the court shall certify accordingly and thereupon the notice of increase shall be, and be deemed always to be, of no effect"; and, by para. 5: "Subject to the provisions of the last foregoing paragraph, the service with a notice of increase of such declaration as is required by this Schedule *shall be treated* for the purposes of s. 23 (1) of this Act as the production of *satisfactory evidence* that work has been carried out as mentioned in para. (*b*) of that subsection; and subject as aforesaid the validity of a declaration shall not be questioned on the ground that the value of the work of repair stated in the declaration to have been carried out on the dwelling-house is less than that required by the foregoing provisions of this Schedule." The foregoing provisions in question, in paras. 1 and 2, provide for a ratio between value of repairs and statutory repairs deduction.

Morris, L.J.'s view, like that of the county court judge, was that as Sched. II used the words "*shall* be treated" and s. 23 (1) the words "the rent recoverable *shall* be increased," it was too late for the tenant to attack the declaration. Parliament had imposed a time limit and made no exceptions to cover any special cases.

"Fraud unravels anything"

runs one sentence in the judgment of Denning, L.J., whose reasoning was that Sched. II, para. 5, meant, it was true, that the landlord could rely on his own word (as contained in the declaration) as satisfactory evidence without supporting it with any records, receipts, or so forth; but that it did not mean that his word could not be challenged at all and was conclusive for all purposes. For though the landlords could be prosecuted under para. 6 of Sched. II and, if found guilty, fined £30, or, if an individual, prosecuted on indictment,

and imprisoned, under the Perjury Act, 1911, s. 5, the increase in rent would pay the fine many times over (the judgment does not attempt to value liberty in cash). No court would allow a person to keep an advantage obtained by fraud; and the learned lord justice referred to three authorities, all decided in the second half of the eighteenth century, dealing with deeds, judgments and contracts, respectively.

In the first of these, *Collins* v. *Blantern* (No. 2) (1767), 2 Wils. K.B. 342, the defence to an action on a bond was that it had been made for an unlawful consideration, an agreement to stifle a prosecution for perjury. Wilmot, C.J., used very emphatic (and picturesque) language both when dealing with the question of validity and when dealing with that of remedy. "The manner of the transaction was to gild over and conceal the truth; and whenever courts of law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish and show the transactions in their true light." The bond, the learned chief justice held, was void *ab initio* "by the common law, by the civil law, moral law and all laws whatsoever . . ." (some backsliding by Grotius was grudgingly admitted). Then, on the question whether a defendant could be allowed to plead the illegality in a court of common law, or must go to equity for redress: "What strange absurdity would it be for the law to say the contract is wicked and void, and in the same breath for the law to say, you shall not be permitted to plead the facts which clearly show it to be wicked and void."

The Duchess of Kingston's Case (1776), 1 Leach 146, was a trial for bigamy in the House of Peers. The defendant had gone through a form of marriage with one Hervey in 1744; in 1768 the Bishop of London's Consistory Court had pronounced sentence of jactitation of that marriage, declaring that she had been and was then a spinster, free from all matrimonial contracts and espousals with A. J. H.; some months later she had gone through a form of marriage by special Archbishop's licence) with the Duke of Kingston. What exactly made the decision of the Consistory Court suspect is not clear from the report; but what matters for present purposes is that the twelve judges called in to assist resolved that the sentence of that court was not conclusive evidence and that "if it were conclusive" the prosecution might call evidence to avoid the effect by proving fraud or collusion. The defendant was convicted, but, it being held that the offence was clergyable, was (although she had been obliged to kneel on being arraigned) allowed to depart without being burned in the hand. But there is, apart from the alternative resolution mentioned, a very Gilbertian flavour about the whole proceeding. For one thing, the exemption from burning was based on the consideration that the prisoner *was* a peeress. Then a good deal had been done to get the indictment removed from the Court of King's Bench to the King in Parliament; but, the net result being that the lady was not a duchess at all but just plain Mrs. Hervey, a commoner, it might be said that the tribunal concerned had had no jurisdiction to try her.

Less romantic was the case of *Master* v. *Miller* (1791), 4 Term Rep. 320, an action by a *bona fide* indorsee of a bill of exchange, the due date of which had been advanced six days, after acceptance, and while in the hands of the drawees: "altered by a person unknown to the jurors" was the finding. Kenyon, C.J., dwelt at some length on the decisions showing that deeds were avoided by alterations made; the learned chief justice appears to have assumed (as did Ashhurst, J., who concurred) that the alteration was made with fraudulent intent, and not by accident; he considered that what applied to deeds must apply to bills; and made the point that the punishment must be considered too little unless the deed also were avoided. Buller, J., thought that bills ought to be distinguished as a deed always had a *profert*, the plaintiffs to have judgment as if the bill bore its original date; Groves, J., considered the alteration fatal to their case.

Denning, L.J., cited those three decisions in support of his view that if the declaration were proved to have been false and fraudulent, it was a nullity and void. It might be suggested that a fraudulently altered negotiable instrument is something very akin to a counterfeit coin, that the Consistory Court did not pronounce a decree *nisi*, that the draftsmen of the Landlord and Tenant Act, 1954, did not frame the common law, civil law, or moral law. But Parker, L.J., agreed that if fraud were proved it vitiated all transactions known to the law of however a degree of solemnity. And one may doubt whether the enactment would have been passed if Sched. II, para. 5, had run: "The service . . . of such a declaration . . . shall be treated . . . as the production of satisfactory evidence whether what is stated therein be true or false and whether, if false, the statements be made with fraudulent intent or otherwise . . ."

Action for fraud?

Parker, L.J., pointed out that if a county court were persuaded by fraud to uphold a declaration and the tenant discovered this months later, he would be entitled to refuse payment of the increase and plead, if sued, that the judgment was obtained by fraud. This, it may be remarked, does not appear to take into account what was said in *Jonesco* v. *Beard* [1930] A.C. 298 on the proper way to deal with such judgments; a fresh action is favoured. In my submission, that remedy would be available to a tenant who had paid the increase without being sued; no court in this land, as Denning, L.J., observed, will *allow a person to keep* an advantage which he has obtained by fraud.

R. B.

CORRESPONDENCE

[The views of our correspondents are not necessarily those of The Solicitors' Journal]

Capital Punishment

Sir,—I have followed with considerable interest the correspondence in your columns on capital punishment. I think the case for the abolitionists would become clearer if the paradox in the retentionists' case was pointed out. This is quite simply "It is wrong to kill; the murderer has killed; let us kill the murderer."

MALCOLM EVANS.

Coventry.

PRACTICE NOTE

REVENUE PAPER

The judges of the Chancery Division have decided that while the Revenue Paper is in their charge they will in connection with cases stated on appeal from the Income Tax Commissioners adopt the practice of the Court of Appeal for the dismissal of appeals by consent. This practice is stated at p. 1262 of the Annual Practice, 1956, and is explained by Lord Greene, M.R., in *Re Samuel* [1954] Ch. 364, at p. 368.

9th March, 1956.

HERE AND THERE

JUDGE-MAKING

In connection with an announcement of the meeting of the Central Council of the International Union of Judges at Munich as the guests of the German Union of Judges, *The Times* published an interesting article comparing various continental systems of appointing judges and maintaining their independence with the British system. In this, as in so many other departments of life, it can hardly be said that the English have a system at all but, on the whole, our lack of system works remarkably well. So often our institutions are like a rambling old house, which has been altered, adapted, added to, sometimes for convenience, sometimes for compromise, sometimes for economy, sometimes even for fun or for a whim, but which has never been pulled down from roof to cellar and rebuilt. It is hard to explain in theory and has nothing of the "neatness is all" tidy-mindedness of a "planned" up-to-date structure. But the up-to-date structure by its very nature is put out of date by the next turn of the calendar, while the old house remains essentially "livable" in because it answers a developing experience of actual human needs, which no theoretical plan can ever wholly compass. The writer of the article compares the stability of our Bench with the fluctuations and problems arising where, as in France, the judiciary is a career apart, with a vista of prospective promotion, not attained as a status by the experienced lawyer but adopted at the outset by the young legal graduate. It is, however, rather hard to see what he has in mind when he says how valuable a safeguard of judicial independence is afforded by the circumstance "that appointment to the High Court can be followed by no further promotion in terms of salary increase or transfer to the Court of Appeal." Was the writer a Scot? I believe in the Court of Session the judges start in the Outer House (first instance) and move up by seniority alone into the Inner House (the appeal courts). But in England a puisne judge may look forward to direct promotion over the heads of his seniors to be a Lord Justice of Appeal, Lord Chief Justice or even Lord Chancellor and, of course, any judge, whether Scots or English, may contemplate the possibility of becoming a Lord of Appeal in Ordinary. That some appointments are made on the advice of the Lord Chancellor and others on that of the Prime Minister does not make our practice any the more theoretically rational. Our High Court judges, once appointed, keep aloof from politics (unlike the Austrian judges, who may sit in Parliament) but this has not saved us, either in England or Scotland, from periods when judicial appointments had a strong political flavour. And how would one explain to a foreigner the nicely balanced situation of the Lord Chancellor?—president of our Court of Cassation, president of our Senate, a member of the Government and a sort of Minister of Justice all in one.

MORAL STRENGTH THE TEST

In Belgium and Holland judicial appointment "approximates to a system of co-option." It is so also in Austria. Since 1946 the appointment of judges in France has been supervised by a new body called the Superior Council of the Magistrature. Its fourteen members consist of the President of the Republic, the Garde des Sceaux and nominees of the President, of the professional organisation of judges and of groupings of the political parties of the National Assembly. These last nominees are not themselves members of the Assembly and are in practice lawyers of standing. The Italians have something of the same system. The writer of the article concludes that what counts most in maintaining the independence of the judges is their own moral strength, and in conclusion he cites an address delivered by the Chancellor in 1563 to the judges of Rouen: "You are judges of the meadow and the field, not of life, not of morals, not of religion . . . If you do not trust yourselves to have the strength to control your passions and love your enemies as God commands, then venture not upon the office of judge." It is a very long time since the independence and integrity of the judges of England has been put to the test of really severe outside pressure from the Government or from an inflamed public opinion. They have been placed in nothing like the situation of the American judges in the present black and white conflict in Alabama, the case of Miss Lucy and the bus boycott at Montgomery. The judiciary as a whole has shown a marked detachment from outside influences in its adherence to principle; the juries inspire less confidence. The American judges have a firm tradition of courage on the Bench. One very notable instance is related in the recently published court room recollections of James Mathers of Oklahoma, "From Gun to Gavel." It was in Tulsa County when the terrorist outrages of the Ku Klux Klan—anti-negro, anti-Catholic, anti-Jewish—had reached such a pitch that the Governor of the state declared martial law. Fifteen hundred soldiers with full battle equipment took over the city hall, the courthouse and the gaol and assumed all the functions of government. Eight men who were supposed to have been concerned in the anonymous floggings in which the Klan specialised were arrested and the commanding officer proposed to try them before a military court, meanwhile refusing to release them on bail. The state head of the Klan entrusted their case to Mr. Mathers for the express strategic reason that he was well known to have no connection with it. He said frankly that he did not believe in anything the Klan advocated but that neither did he believe in letting the military take over the courts. Immediately he set about applying for a writ of *habeas corpus*. Of the six judges in the county only two were not Klansmen, a Catholic and a young Jew of twenty-four. Mathers filed his application before the Jew and argued that even under a state of martial law the Governor had no authority to suspend the civil courts. The Attorney-General of the state opposed with cases and precedents. The young judge listened attentively and at the end retired for fifteen minutes to consider his decision. Returning, he ruled that the writ should issue; the power of the civil courts could not be made subservient to the military. The Attorney-General rose and said that he could still advise the Governor that the military were in charge even of the courts. "And if you do, Mr. Attorney-General," said the judge, "I will consider you in contempt of court and order you to be punished accordingly." The Attorney-General rejoined to threaten the judge with a contempt order from the military tribunal. The judge said he would adjourn before anything else could happen that would give cause for regret in future years. He then signed the writ, making it returnable at 9.30 the following morning. The aged bailiff served the document on the adjutant-general and the colonel in command and punctually the prisoners were produced and released on bail, pending trial by the civil courts. Judicial courage had vindicated judicial impartiality.

Richard Roe.

Country Practice

PROFESSIONAL CONDUCT

THE hair-raising series of quizzes in the *Law Society's Gazette* has even included a mortifying one on etiquette. One may manage a theatre, or keep a pub, but not run a pawnbroker's establishment. On a par with pawnbroking—and this is what chills the blood—estate agency is banned. But if my client instructs me to collect rent, pay the plumber's bills, and try and sell each cottage as it becomes vacant, what am I to do? Perhaps that doesn't really count as estate agency; perhaps, in country districts, nobody will notice. Perhaps the old Solicitors' Remuneration Order, providing scales for negotiating a sale and conducting an auction, became effective in the days when solicitors were not so pure as they are to-day. One day, if the purity campaign continues, it will become an offence for a solicitor to undertake accountancy and income tax work. When that day comes, the rural solicitor's practice will become rather pointless.

Of course, it all depends what you mean by estate agency. Far from the madding trolleybuses or tubes a good deal of work goes on which, in the cities, would be properly turned over to an estate agent. I take it that every town of five or ten thousand souls contains a regular estate agency business run by a qualified estate agent. It is worth pointing out that in towns of only 2,000 inhabitants it is an hour's bus ride to a proper estate agent's office, though the solicitor is in practice just round the corner in the little town itself. You may remember I once had myself enrolled as a certified bailiff under the Distress for Rent Rules. This was not with the object of filching bread from the mouths of the estate agents; it was just that no estate agent was available within a radius of thirty miles who would undertake the unpleasant task. Hallelujah, I'm a bailiff, as the solicitor said to the Disciplinary Committee.

The question of professional conduct and etiquette cannot—I hope the Council will agree—be solved by laying down a whole series of prohibitions. Certain types of work, if indulged in by some solicitors, would degrade the whole profession, and the old decision on pawnbroking was no doubt arrived at with a view to safeguarding the reputation of solicitors generally. I take it that other types of work are reprehensible only when the manner in which they are carried out creates distaste. I should like to know just how to run a pub simultaneously with a practice; and yet (according to the quiz master) it can be done. ("Sorry, sir, no swearing affidavits in the bar—come through into the lounge.")

The hidden terrors of professional etiquette tend to disappear if one's conscience remains sensitive or (for the benefit of any readers who are not quite certain what has happened to their conscience after all these years) if one has acquired the character of a gentleman. The pitfalls then should appear as obvious as the social gaffes one contrives to avoid in ordinary life. Books on etiquette never were much good.

Take, for instance, an ordinary visit to a farming client. Nothing in it, you say. Wait until you have read of the difficulties—then stay at home.

On first visiting a farm-house, the caller should pause for a few moments while deciding which door should be approached. The front door, it will be discovered, is at the side or even at the back. (Statististics prove that the front door of a farm-house only has a one-in-four chance of actually facing the road.) The door should then be knocked, and the visitor should then feign an interest in the crops while tables and chairs are heaved out of the way and the key is being fetched as a preliminary to the actual opening of the door. The visitor may then be expected to enter the best parlour; he is warned to keep his overcoat on, as the place will be perishingly cold—no fires in winter, and no sun in summer, in case the furnishings lose their rich colour. While the visitor engages the farmer's wife in conversation, the farmer himself is changing into carpet clippers in another part of the house as a necessary preliminary to partaking of tea out of the best china in the best parlour with his welcome guest. A grisly occasion which, if described in a book on etiquette for young solicitors, can be expected to keep the reader in a state of morbid terror (similar to that induced by a quiz) until he has actually experienced the thing himself.

Once having paid a professional visit to a farmer, any reasonable solicitor can forget about etiquette, and enter by the back door on all future occasions, as nature intended. The kitchen of a good farm-house is like the great hall of a mediæval baron, where business and pleasure in great variety can develop comfortably, and the tea tastes all the better. For confidential business, there is the second-best parlour or (as the farmer's wife may sometimes call it) men's room. The kitchen will do for taking proofs of evidence in some county court dispute; but for the well considered will, the tax-conscious company flotation, and the cunning acquisition of a neighbour's farm, obtain your instructions in the leathery, smoky snugness of the second-best parlour.

In one respect, I am all for back door methods.

HIGHFIELD.

In the next talk in the "Law in Action" series, to be broadcast on 2nd April in the B.B.C.'s Third Programme, R. Y. Jennings, Professor of International Law at Cambridge and Fellow of Jesus College, will deal with International Monopolies and International Law. He will discuss questions arising from a recent attempt to enforce the U.S. Anti-Trust Act of 1890—the Sherman Act—against a British company.

Another feature in the series "Doctor at Law," depicting the part played by the medical profession in legal disputes and crime cases, will be heard in the B.B.C.'s Home Service on 6th April. It is "Result of an Accident," written and produced by Nesta Pain.

Mr. Thomas Cecil Nicholson, solicitor, of Wath-upon-Dearne, Yorkshire, left £336,886.

Mr. Thomas Griffin Williams, solicitor, of Wolverhampton, left £58,165.

Mr. George Espley, solicitor, of Wellington, Salop, left £11,047 (£7,220 net).

Mr. Bernard Damian Joseph Hayes, solicitor, of Shrewsbury, left £20,057 (£19,760 net).

Mr. Thomas Smailes, solicitor, of Huddersfield, left £12,262 (£10,878 net).

TALKING "SHOP"

PLUM DICTATES A LETTER: RECORDING BY GLADYS PEACH

March, 1956.

Good-morning, Miss Peach. A bit warmer, don't you think? Noise and air or the usual fug? All right, we'll try it with the window open for once.

Well, let's get started. Just take down this name and address whilst I sort myself out. *Buzz.* Harrison? Lewin on Trusts. Had it here yesterday—now it's gone. Chase round the office, like a good chap, will you? Thanks. Well, now. Dear Sir (you've got the heading and reference?), We have considered your letter of the first instant—most appropriate date I'd say—and—er—think it as well to state at the outset that the problem is one . . . *Ring, ring.* Hullo? Personal call for you from Manchester, Mr. Plum; hold on, please. *High-pitched buzz.* Mr. Plum? Yes. Personal call for you; hold on, please. (Sound as of grinding molars and twittering sparrows, in about equal proportions.) *Click* (silence). Cut off, Miss Peach. Where were we? "Think it as well to state at the outset that the problem is one," Mr. Plum. Of the utmost difficulty. I say, that makes it sound a bit steep, doesn't it? Don't want to give these people an exaggerated idea of their own importance, do we? *Ring, ring.* Hullo? Your personal call from Manchester again, Mr. Plum. Thank you. *High-pitched buzz.* Mr. Plum? Yes. Personal call for you; hold on, please. Thank *you.* (Molars and sparrows. Bats. Boiling kettle.) *Click.* Is that Mr. Plum speaking in person? Yes, it's still Mr. Plum. Hold on, please. Thank you. (Long pause.) Oh, well, let's get on with it, Miss Peach. The problem is by no means . . . *Triple clicks.* Plum? Ah, Beetroot, good morning. Not at all. No, I mean Yes. Certainly, by all means. Yes, of course. Just a moment, now, where's my diary? Where's my diary, Miss Peach? Ah, here we are. Yes, three o'clock on Tuesday, Yes, that'll be fine. Good; excellent; splendid; oh, well done, capital; look forward to seeing you then; yes, certainly; on Tuesday, 3 p.m.; good. Good-bye. *Click.* That was Mr. Beetroot, Miss Peach. Yes, Mr. Plum. Coming to see me on Tuesday. Frightful old bore. Yes, Mr. Plum. Now, where were we? "The problem is by no means," Mr. Plum. Ah, yes, free from difficulty: a useful cliché.

(Discreet knock.) Come in. Sorry, sir, but I have several urgent cheques here; would you mind? Oh, very well. I say, what's this? Thought we'd completed this last week? Yes, sir, balance of deposit. Oh, I see; thank you. Thank *you*, sir. *Low-pitched buzz.* Yes, what is it, Harrison? Can't find Lewin on Trusts? Confound it; well, never mind; thanks for looking. Now, where do you suppose it can be, Miss Peach? Damn it; here it is; must have been under my diary all the time. *Buzz.* Harrison? So sorry, the book's just turned up. What was that? Didn't like to suggest it was here? I should think *not.*

Now, then. By no means free from difficulty. To put the matter briefly, the question at issue is whether the sum that the trustees have received from the Custodian of Enemy Property should be treated as capital or income or rateably apportioned between the two in accordance with the well-known rule in *Re Atkinson.* What do you think about that, Miss Peach? I'm afraid I have no strong views on the subject, Mr. Plum. *Buzz.* Polkinghorn? What do you know about the well-known rule in *Re Atkinson?* Well, damn it, don't they teach you anything at law school nowadays? That's what these people call it—the well-known rule. Well, never mind. Better look it up some time.

Ring, ring. Ah, good-morning, Mrs. Blight. Yes, indeed. Still act for the trustees? Yes, certainly we do. Pigs on the land behind your cottage? No, I hadn't heard about that. Just a moment, I'll see what I can find out. *Buzz.* Filbert? Look here, I've got Mrs. Blight on the line about pigs at the back of her cottage. Says we've sold the land or something. We have? Oh, dear. Are you there, Mrs. Blight? Yes, it seems that the trustees have accepted an offer for the land but there's no contract yet. Thought we'd protect your interests? Pleased to do anything we can. No; I don't really know if he proposes to put pigs on it or not. Don't we know anything? Well, at this stage, perhaps not so much as the trustees' surveyors, Mrs. Blight; they negotiate these sales. Have you tried speaking to them? Refused to sell the land to you? No, I hadn't heard about that. Cut you off in the middle of a telephone conversation? I say, that was too bad. I'll have a talk with them and see what can be done; but of course you'll realise that the purchaser being a farmer . . . *Click.* There's a call waiting for you on a trunk line, Mr. Plum. Well, I'm sorry, but I can't take it now. Put it through on my secretary's line, please. Take this trunk call on your line, Miss Peach, if you don't mind. *Click.* So sorry, Mrs. Blight, we seem to have been cut off. Now, about these pigs . . .

Ah, there you are, Miss Peach. What was the trunk call about? Oh, was that all? Good; now where were we? "Apportioned between the two in accordance with the well-known rule in *Re Atkinson,*" Mr. Plum. Ah, yes. My word, Miss Peach, d'you realise we've been half an hour at this already? *Buzz.* Plum? Apple here. I say, old chap, I wish you'd get your confounded secretary to answer the house-phone. Blasted thing goes dead on me every time; have you been hanging up on me? Both of you on the outside phone? Oh, well. Look here, there's a fellow by the name of Colonel Blight rousing merry hell in the outer office. Something about pigs in his parlour. You'll buy it? Good for you.

Buzz. Harrington? Tell Colonel Blight I'll see him in five minutes. Give him a copy of *Country Life;* no, better make it the *Tatler. Buzz.* Filbert? Bring me down that file about the land behind Mrs. Blight's cottage, will you? *Buzz.* Polkinghorn? Miss Peach will bring you up that letter I told you about, and I want a note on *Re Atkinson* by three o'clock this afternoon; not more than one sheet of foolscap, please. Just a minute. Shut that window, Miss Peach, if you don't mind. Can't hear myself speak. Sorry, Polkinghorn, what was that? Borrow Lewin on Trusts? Yes, but make sure you return it. Most elusive, that book. Ah, there you are, Filbert.

Well, thank you, Miss Peach; that must be all for the moment. Better do it as a draft, I fancy.

Yes. Mr. Plum; I'll be sure to do it as a draft, Mr. Plum.

"ESCROW"

NOTES OF CASES

These Notes of Cases are published by arrangement with the Incorporated Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible, the appropriate page reference is given at the end of the note.

Judicial Committee of the Privy Council

MALAYA: INCOME TAX: COMPANY DIVIDEND: DEDUCTION OF TAX

Comptroller of Income Tax *v.* Harrisons and Crosfield (Malaya), Ltd.

Lord Oaksey, Lord Morton of Henryton, Lord Radcliffe, Lord Cohen and Mr. L. M. D. de Silva

8th March, 1956

Appeal from the Court of Appeal of Malaya.

This appeal arose out of an assessment to income tax made upon the respondent company by the appellant Comptroller of Income Tax for the year of assessment 1951, under the Income Tax Ordinance, 1947, of Malaya, as amended to 1951. The question was what rate of income tax ought to be charged in respect of a part of the income of the respondent company amounting to $533,333 that was distributed by way of dividend to its shareholders in November, 1950. The respondent's trading year ended on 30th June, 1950. The contention of the respondent was that the rate of tax to be charged in respect of that part of the income of the company was 20 per cent. only, being the rate deducted by the company from the dividend in question in accordance with the terms of the Income Tax Ordinance then in force. By a later ordinance, the Income Tax Ordinance, 1947, as amended to 1951, the rate of tax upon the profits, part of which had already been distributed as aforesaid and had been the subject of deduction of tax at the rate of 20 per cent. only, was raised to 30 per cent., and the company now claimed that in the circumstances it was entitled to the relief provided by s. 39 of the Ordinance of 1947 as amended, and that the relief to be given ought to be by way of the reduction of the rate of tax from 30 per cent. to 20 per cent. in respect of the part of the company's profits which had already been distributed as dividend. Section 39 of the Ordinance of 1947 as amended provided: ". . . there shall be levied and paid for each year of assessment upon the chargeable income of (*a*) every company, tax at the rate of 30 per cent. on every dollar of the chargeable income thereof; . . . Provided that where any company proves to the satisfaction of the Comptroller that any dividends have been paid out of such chargeable income . . . an amount equal to such dividends . . . may be charged at a lower rate or not charged with any tax as the Comptroller shall determine." The Comptroller contended that, for the proviso to apply, the dividends must have been paid out of the chargeable income which accrued or arose during the year of assessment itself, namely, 1951, or that, at any rate, the dividends must have been paid in that year, that they were not so paid and that, therefore, he had no legal power to apply the proviso in the respondent's favour. The company's contention had prevailed in all the tribunals below—the Income Tax Board of Review, the High Court and the Court of Appeal of Malaya. The Comptroller now appealed.

LORD RADCLIFFE, giving the judgment, said that "chargeable income" was under the Ordinance the income of the year preceding the year of assessment, and the respondent's payment of dividend in November, 1950, having been made out of its chargeable income for the year of assessment 1951, the condition required for the operation of the proviso to s. 39 was satisfied. The appellant was, therefore, wrong in supposing that he was not legally entitled to exercise his power under the proviso in favour of the respondent, and his refusal to entertain the respondent's application was invalid. The true position was that while the respondent was an aggrieved person within the meaning of s. 75 (1) of the Ordinance, its grievance consisted, not of the fact that its rate had not been reduced—the proviso did not create a legal right in the respondent to have the rate reduced—but in the fact that owing to a misconception of the law on the part of the appellant he had failed to consider whether and to what effect he ought to exercise his power to reduce it. The refusal to entertain the application was unfounded in law and invalid, and the appellant ought now to proceed to take the application into consideration on the footing that the dividends referred to were paid out of the chargeable income of the year of assessment 1951 (see *Pioneer Laundry & Dry Cleaners, Ltd.* v. *Minister of National Revenue* [1940] A.C. 127). Appeal allowed. Having regard to the fact that throughout the proceedings each party had, in effect, contended for a position which in law was not maintainable, each should pay his or its own costs of the hearings and of this appeal.

APPEARANCES: *F. N. Bucher*, Q.C., and *P. Shelbourne* (with them *M. P. Nolan*) (*Charles Russell & Co.*); *Roy Borneman*, Q.C., and *Sir Reginald Hills* (*Stephenson, Harwood & Tatham*).

[Reported by CHARLES CLAYTON, Esq., Barrister-at-Law] **[2 W.L.R. 834**

Court of Appeal

NUISANCE: USE OF PREMISES FOR PROSTITUTION: FORM OF INJUNCTION

Thompson-Schwab and Another *v.* Costaki and Another

Lord Evershed, M.R., Romer and Parker, L.JJ.

21st February, 1956

Appeal from Wynn Parry, J.

The plaintiffs sought an injunction restraining the defendants from using residential premises in the West End of London for the purposes of prostitution, and alleged that the activities complained of seriously interfered with the comfortable and convenient enjoyment of their nearby dwelling-houses where they resided with their respective young families, and had an adverse effect on the value of those houses for residential purposes. Wynn Parry, J., ordered that the defendants be restrained until trial or further order from using, causing or permitting the premises to be used for the purposes of prostitution, and he ordered them to pay the costs of the motion forthwith. The defendants appealed.

LORD EVERSHED, M.R., said that the defendants had submitted that activities of the kind complained of had never been held to constitute a common-law nuisance and that they should be free (that is, without impinging on the civil rights of any other person) to use the premises for the purposes of prostitution to their heart's content. For the purpose of the motion his lordship took as correct the description of what constituted a nuisance given in Clerk and Lindsell on Torts, 11th ed., p. 561, para. 970, and the language of Lord Wright in *Sedleigh-Denfield* v. *O'Callaghan* [1940] A.C. 880, the test being whether what was being done interfered with the plaintiffs in the comfortable and convenient enjoyment of their land, regard being had to the usages in this matter of civilised society, and regard being also had to the character, as proved, of the neighbourhood. The evidence in support of the motion amply justified the judge's using his discretion to grant an injunction. The form of the injunction granted was, however, open to criticism, for it was clear that if the phrase "for the purposes of prostitution" were to be given its widest meaning it would cover uses of premises which might well not constitute a nuisance. On the other hand, it was not possible to assert that no use of premises for the purposes of prostitution could cause a nuisance. The form of the order should be amended to comply with the usual practice of the Chancery Division by limiting the prohibition against use for the purposes complained of to use "in the manner complained of by the plaintiffs in this action or otherwise so as to cause a nuisance to the plaintiffs or either of them" and by ordering the defendants to pay to the plaintiffs their costs of the motion in any event.

ROMER, L.J., and PARKER, L.J., agreed. Appeal dismissed.

APPEARANCES: *Ingram J. Lindner*, Q.C., and *B. B. Stenham* (*Beach & Beach*); *Charles Russell*, Q.C., and *Maurice Berkeley* (*Reynolds, Gorst & Porter*).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] **[1 W.L.R. 335**

Probate, Divorce and Admiralty Division

DIVORCE: PRESUMPTION OF DEATH AND DISSOLUTION OF MARRIAGE: CONTINUAL ABSENCE FOR SEVEN YEARS

Thompson *v.* Thompson

Sachs, J. 21st February, 1956

Undefended petition by a husband for a decree of presumption of death and dissolution of marriage.

The parties married in 1920, both then being aged 21. There were three children of the marriage born respectively in 1921, 1926 and 1930. The husband and wife last lived together in September, 1937, when the husband left the wife and assumed care of the children. From December, 1937, to 1946, there were a number of occasions when the parties contested before the justices issues as to whether the husband should pay the wife any, and if so what, maintenance, and as to who should have custody of and access to the children. From December, 1937, onwards the husband was under a liability, by virtue of justices' orders, to pay his wife maintenance. After the order of December, 1937, the wife was not bound to cohabit with the husband and did not, in fact, do so. The husband had not seen her since 1942, when the wife had, in fact, become a tramp of no fixed abode, carrying her belongings in a bag. She used, however, to collect her maintenance comparatively regularly from the justices' court at Ealing until 18th March, 1946. After that date she did not call again until police inquiries as to her whereabouts resulted in her visiting the court on 15th December, 1947, for the money the husband had meanwhile deposited for her week by week. She next went there, for the same purpose, on 2nd February, 1948, and after that once more, on 17th February, 1948. Since then no one was known to have seen her; and the money paid into the court office regularly by the husband had not been collected. There were no relatives of the wife from whom news of her was available and extensive inquiries in recent years neither led to the wife being traced nor disclosed the existence of any relevant registration of death. On 24th February, 1955, seven years and seven days from the date when the wife was last seen, the husband filed a petition for a decree of presumption of death and dissolution of marriage under s. 16 of the Matrimonial Causes Act, 1950. *Cur. adv. vult.*

SACHS, J., reading his judgment, said that s. 16 (2) of the Act provided that: "In any such proceedings the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner, and the petitioner has no reason to believe that the other party has been living within that time, shall be evidence that he or she is dead until the contrary is proved." The critical phrase in the present case was that "the petitioner has no reason to believe that the other party has been living within that time," and the following matters appeared to be established: First, the test to be applied by the court related to the position as it appeared to a single specified person—the petitioning spouse. Secondly, the onus of proving that the position was one which brought him within the benefit of the subsection lay upon the petitioner (*Parkinson* v. *Parkinson* [1939] P. 346). Appropriate inquiries had been made in the present case, and he (his lordship) would not decide upon the position where no inquiries had been made at all. Thirdly, the test as to whether or not there was "reason to believe that the other party has been living" must relate to the standards of belief of a reasonable man and not to those of the particular petitioner. Fourthly, facts from which the inferences were no more than "pure speculation" did not constitute "reason to believe." The line between "pure speculation" and "reason to believe" was difficult; but it would suffice for the purpose of the present case to say that where, on the relevant facts known to the petitioner, it seemed to a reasonable man that there was more than a fifty-fifty chance of the "other party" being alive, then the matter undoubtedly came out of the realm of pure speculation, and the petitioner could not be held to have proved that he or she had "no reason to believe" that the other party had been living. Fifthly, it was clear that, if at any point in the seven years preceding the petition, either in the first or last week of those years, there was "reason to believe" (within the meaning of the subsection) that the other spouse was alive, the petitioner could not avail himself of the subsection. As the petition had been filed as shortly as seven days after the seven years had elapsed since the wife was last seen alive, the strong probabilities were that she was alive during, at any rate, the first week of the seven years immediately preceding the petition. Accordingly, if in relation to a case of mere disappearance, "reason to believe" included inferences to be drawn from the mere fact that the wife was alive in sound health and in no known danger just before the seven years began to run, the petitioner would fail to bring himself within the beneficial part of the subsection, namely, that part which preceded the words "until the contrary is proved." If, on the other hand, "reason to believe" could only be produced by aid of evidence as to some matter supervening during those seven years, then the petitioner came within it. His lordship considered the intention of the Legislature, and said that he adopted the second interpretation, which involved construing the critical phrase as if the Legislature had, in substance, said "if nothing has happened within that time to give the petitioner reason to believe that the other party was then living." The effect was to produce a clean cut and convenient rule. It freed a petitioner from the practical difficulties that attended litigation in which the decisive test as to whether or not death should be presumed was the proper inference to draw from the totality of all the wide range of facts admissible where there was no statutory provision. It followed that the petitioner in the present case had brought himself within the beneficial part of subs. (2). He had established a *prima facie* case that his wife was dead—and on the facts, the contrary not having been proved, he was entitled to the decree which he sought. Decree *nisi*.

APPEARANCES: *N. C. Lloyd-Davies* (*B. L. Harris & Co.*); *Colin Duncan* (*The Queen's Proctor*).

[Reported by JOHN B. GARDNER, Esq., Barrister-at-Law] **[2 W.L.R. 814**

IN WESTMINSTER AND WHITEHALL

HOUSE OF LORDS

PROGRESS OF BILLS

Read First Time:—

Consolidated Fund Bill [H.C.] [22nd March.

To apply a sum out of the Consolidated Fund to the service of the year ending on the thirty-first day of March, one thousand nine hundred and fifty-five, one thousand nine hundred and fifty-six, and one thousand nine hundred and fifty-seven.

Department of Scientific and Industrial Research Bill [H.L.] [20th March.

To make provision with respect to the Department of Scientific and Industrial Research, and for purposes connected therewith.

Edinburgh Corporation Bill [H.C.] [22nd March.

Justices of the Peace Act, 1361 (Amendment) Bill [H.C.] [20th March.

Read Second Time:—

Castle Gate Congregational Church Burial Ground (Nottingham) Bill [H.C.] [21st March.

Rabbits Bill [H.L.] [22nd March.

Validation of Elections (Northern Ireland) Bill [H.C.] [22nd March.

Read Third Time:—

Copyright Bill [H.L.] [22nd March.

Housing Subsidies Bill [H.C.] [22nd March.

Solicitors (Amendment) Bill [H.L.] [20th March.

In Committee:—

Archdeacon Johnson's Almshouse Charity (Oakham and Uppingham) Scheme Confirmation Bill [H.C.] [22nd March.

Baptist Chapel and Other Charities (Totnes and Tuckenhay) Scheme Confirmation Bill [H.C.] [22nd March.

In Committee (*continued*) :—

Leigh Almshouse, Stoneleigh and Other Charities Scheme Confirmation Bill [H.C.] [22nd March.

Local Authorities (Expenses) Bill [H.C.] [22nd March.

Ministry of Housing and Local Government Provisional Order (Colne Valley Sewerage Board) (No. 2) Bill [H.C.] [22nd March.

Sexual Offences Bill [H.L.] [22nd March.

HOUSE OF COMMONS

A. Progress of Bills

Read Second Time :—

Elder Yard Chapel Chesterfield Bill [H.L.] [19th March.

Greenock Burgh Extension &c. Order Confirmation Bill [H.C.] [22nd March.

Leeds Corporation Bill [H.C.] [21st March.

Sion College Bill [H.L.] [19th March.

Read Third Time :—

Teachers (Superannuation) Bill [H.C.] [22nd March.

Willoughby de Broke Estate Bill [H.L.] [21st March.

B. Question

High Court Rules (Investments)

Mr. H. Fraser asked for the High Court rules to be altered, in order to safeguard the interests of minors and others, so that, in future, compensation and other payments be invested in dated rather than undated Government securities, where the investment of such funds fell within the discretion of the court. The Solicitor-General replied that the court always endeavoured to select the investments which best served the interests of the parties and, depending on the circumstances, either dated or undated securities might do so. In the selection of suitable investments, the court usually sought the advice and agreement of the parties. [19th March.

STATUTORY INSTRUMENTS

Agriculture (Poisonous Substances) (Organo-mercury Compounds) Order, 1956. (S.I. 1956 No. 376.)

Approved Schools (Contributions by Education Authorities) (Scotland) Regulations, 1956. (S.I. 1956 No. 362 (S. 15).)

Batley and Dewsbury Water Order, 1956. (S.I. 1956 No. 374.) 6d.

Devizes (Extension) Order, 1956. (S.I. 1956 No. 369.) 8d.

Eggs (Guaranteed Prices) Order, 1956. (S.I. 1956 No. 364.) 5d.

Hire-Purchase and Credit Sale Agreements (Contracts) Licence, 1956. (S.I. 1956 No. 373.)

See *ante*, p. 232.

Importation of New Potatoes and Raw Vegetables Order, 1956. (S.I. 1956 No. 372.) 5d.

Kensington Gardens Regulations, 1956. (S.I. 1956 No. 353.) 5d.

Liverpool–Preston–Leeds Trunk Road (Saulesbury, near Preston, Link Roads) Order, 1956. (S.I. 1956 No. 355.)

Malmesbury (Extension) Order, 1956. (S.I. 1956 No. 371.) 8d.

Milk (Guaranteed Prices) Order, 1956. (S.I. 1956 No. 363.) 5d.

Preston (Extension) Order, 1956. (S.I. 1956 No. 370.) 8d.

Retention of a Cable, a Main and a Pipe under a Highway (Flintshire) (No. 1) Order, 1956. (S.I. 1956 No. 342.)

Stopping up of Highways (Barnsley) (No. 1) Order, 1956. (S.I. 1956 No. 338.)

Stopping up of Highways (Essex) (No. 6) Order, 1956. (S.I. 1956 No. 340.)

Stopping up of Highways (Gloucestershire) (No. 3) Order, 1956. (S.I. 1956 No. 352.)

Stopping up of Highways (Worcestershire) (No. 3) Order, 1956. (S.I. 1956 No. 341.)

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 21 Red Lion Street, London, W.C.1. The price in each case, unless otherwise stated, is 4d., post free.]

NOTES AND NEWS

Miscellaneous

York Development Plan

The Minister of Housing and Local Government has approved with modifications the development plan for the County Borough of York. The plan, as approved, will be deposited in the Guildhall, York, for inspection by the public.

SOCIETIES

The eightieth annual general meeting of the Bradford Incorporated Law Society was held at the Midland Hotel, Bradford, on 14th March, when the following officers were elected: president, Mr. John Duncan; senior vice-president, Mr. Stanley Ackroyd; junior vice-president, Mr. Geoffrey H. Hall; joint hon. secretaries, Mr. Charles P. Pickles, LL.B., and Mr. R. W. T. Vint, M.A.

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